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MH LAND SDN BHD & ANOR v. RIBBON MARKETING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HUE SIEW KHENG J
[SUIT NO: 22NCVC-621-11-2013]
B 29 APRIL 2016

CONTRACT: *Sale and purchase of land – Agreement – Breach – Claim for specific performance – Whether there was a concluded and binding contract – Whether concluded contract wrongly repudiated – Whether claim for specific performance*
C *ought to be allowed*

LEGAL PROFESSION: *Retainer – Authority – Breach of warranty – Sale of land – Sale and purchase agreement – Whether solicitor liable to plaintiff for breach of warranty of authority to act – Whether solicitor authorised to act – Whether*
D *retainer had to be in writing – Whether retainer could be inferred from acts subsequently done by solicitor and acquiesced to by client*

The plaintiffs' original claim was against the first till the eighth defendants for (i) specific performance for an agreement concluded on 31 July 2013 in respect of, amongst others, a piece of land ('lot 233'); and (ii) damages for
E breach of warranty by the eighth defendant. The first, second, third, fifth, sixth and seventh defendants entered into a consent judgment and the plaintiffs' claim proceeded against the fourth and eighth defendants ('D4' and 'D8') only. The plaintiff contended that there was a concluded agreement on 31 July 2013 in respect of the sale of lot 233 *via* an exchange of three letters
F between D8 ('KH Tai') and the plaintiffs' lawyer ('KWC'). The letters were namely, (i) letter dated 22 July 2013 from KWC to KH Tai; (ii) letter dated 31 July 2013 from KH Tai to KWC; and (iii) letter dated 31 July 2013 from KWC to KH Tai. It was also the plaintiffs' contention that KH Tai was in breach of warranty of authority wherein by its letter dated 31 July 2013, KH Tai had represented itself to the plaintiffs to be the agent of D4 and by such
G representation, induced the plaintiffs to enter into the agreement. D4, however, argued that KH Tai was not authorised to act on his behalf and further contended that there was no concluded and binding contract for the sale and purchase of lot 233 by KWC's letter dated 31 July 2013. KH Tai refuted D4's allegation that it did not have the authority to act for D4.
H However, KH Tai took the same position that there was no concluded and binding contract for the sale of lot 233. The issues that arose for determination, *inter alia*, were (i) whether there was a concluded and binding contract entered between the parties; and (ii) whether KH Tai was authorised to act for D4.

I **Held (allowing plaintiffs' claim against the fourth defendant; dismissing plaintiffs' claim against eight defendant):**

(1) There was a concluded agreement in the trilogy of letters because (i) the parties, properties and price had been identified with sufficient clarity; (ii) the payment terms had been set out; (iii) the manner and form of

possession had been set out; (iv) there had been part performance as the plaintiffs had been paid 2% earnest deposit for lot 233 which had been accepted and banked into KH Tai's client account. If the essential and fundamental terms were not agreeable to the defendants, KH Tai would and should have returned the 2% earnest deposit pursuant to cl. 8 of letter dated 31 July 2013. As KH Tai had proceeded to accept and bank in the 2% earnest money, this signified part performance of a concluded and binding contract. (paras 46, 47 & 48)

(2) The agreement was an 'open contract' which in law is enforceable. Read in context of the three letters, the objective aim of the transaction was indicative of an intention to merely formalise the agreement already concluded between the parties. It was not a mere letter of intent. It was manifestly clear that KH Tai's letter of 31 July 2013 was an 'invitation to treat' and KWC's letter of the same date was a counter offer to which DW5 had made some amendments which was in turn, accepted by the plaintiffs. This was clear evidence of acceptance. (paras 49 & 51)

(3) Nowhere in his defence had D4 pleaded that KH Tai was not authorised by him. D4 could not now be allowed to resile from his pleaded case to deny KH Tai's authority to act on his behalf. On this ground alone, D4's contention that KH Tai lacked authority to act on his behalf could not be sustained. Further, a retainer does not have to be in writing and may be oral. It can also be inferred from acts subsequently done by the solicitor and acquiesced to by the client. On the facts, upon receipt of the email from KH Tai enclosing KWC's letter of 31 July 2013, DW3, whom D4 claimed to be his solicitor all along, not only commented on the terms proposed by KWC but instructed KH Tai that the amount payable to D4 be paid separately and queried whether the other beneficiaries had given their written consent. This pointed to the fact that DW3 was endorsing KH Tai's actions and expressing D4's agreement to proceed with the transaction. DW3's email and testimony were cogent evidence of the fact that KH Tai was authorised by D4 and that it was D4's intention to sell lot 233 as at 31 July 2013. KH Tai's lack of authority was nothing but an afterthought. Therefore, the plaintiffs' claim against KH Tai was dismissed. (paras 60-63, 65, 66 & 81)

(4) The insistence that there was no concluded agreement was nothing more than a camouflage for a demand for more money. The plaintiffs had proven, on the balance of probabilities, that KH Tai had the authority to act for and on behalf of D4 and the trilogy of letters constituted a binding and concluded contract for the sale of lot 233. In the circumstances, D4 had wrongfully repudiated the concluded contract. (paras 72, 73 & 74)

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Blyth v. Fladgate [1891] 1 Ch 337 ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 BLJ 9 SC ***(refd)***

Loh Hoot Yeang v. Derrick Edwin David [2006] 2 CLJ 66 CA ***(refd)***

Mahabuilders Bhd v. Hotel Rasa Sayang Sdn Bhd [2014] 3 CLJ 661 HC ***(refd)***

MWE Properties Sdn Bhd v. Saw Lip Kean [2011] 8 CLJ 172 CA ***(refd)***

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia [2000] 3 CLJ 313 CA ***(refd)***

Tan Chee Hoe & Anor v. Ramjethmal Punjabi [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022 HC ***(refd)***

Turriff Construction Ltd and Turriff Ltd v. Regalia Knitting Mills Ltd (1971) 9 BLR 20 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 7

For the plaintiffs - Conrad Young & Tan Ch'eng Leong; M/s Sreenevasan Young
For the 4th defendant - Surjan Singh Sidhu; M/s Surjan Singh Sidhu & Co
For the 8th defendant - Wong Hok Mun; M/s Azim, Tunku Farik & Wong

Reported by Sandra Gabriel

JUDGMENT

Hue Siew Kheng J:

Introduction

[1] The plaintiffs' original claim against the eight defendants (D1-D8) is for:

(i) specific performance of an agreement concluded on 31 July 2013 in respect of two pieces of land, ie, one held under GRN 35596 Lot 1275 (Lot 1275) and the other held under GM 803 Lot 233 (Lot 233) both of Mukim Setapak, Daerah Kuala Lumpur; and

(ii) damages for breach of warranty of authority by D8.

[2] Before trial commenced, D1, D2, D3, D5, D6 and D7 entered into a consent judgment dated 7 April 2015.

[3] The plaintiffs' claim proceeded for trial against D4 and D8 only.

The Parties

[4] The plaintiffs are private companies belonging to one Datuk Koh Chui Ming (PW1).

[5] D1 and D2 are the registered proprietors of Lot 1275.

[6] D3-D7 are the registered proprietors of Lot 233.

[7] D2-D7 are related to one another in the following manner:

(i) D2, D3, D5 and D6 are agnate siblings;

(ii) D4 is the cousin of D2, D3, D5 and D6;

(iii) D7 is married to D2;

(iv) Ms Tan Lin Lin, a partner in Messrs KH Tai & Co of (D8) is the wife of D3 and was the lawyer handling the transaction in dispute for the vendors of Lot 233; and

(v) D4's mother, Koh Yuet Thye (DW4) and sister, Lim Sung Yoong of Messrs Lim & Associates (DW3) were involved in the disputed sale of Lot 233.

The Witnesses

[8] A total of 13 witnesses testified in this case.

For the plaintiffs:

(i) PW1 - Tan Sock Kim	-	retired interpreter who transcribed the audio recording
(ii) PW2 - Datuk Koh Chui Ming	-	owner of the plaintiff companies
(iii) PW3 - Teh Kooi Kim	-	retired banker and advisor to PW2
(iv) PW4 - Tan Ann Sze	-	real estate negotiator
(v) PW5 - Tang Fat Yan	-	real estate negotiator
(vi) PW6 - Lee Choon Keong	-	Public Bank branch manager at Setapak
(vii) PW7 - Tan Kar Peng	-	partner of Messrs Kamaruddin, Wee & Co representing the plaintiffs

For D4:

(viii) DW1 - Dr Lim Sheng Bang	-	D4
(ix) DW2 - Lim Weng Keong	-	property agent
(x) DW3 - Lim Sung Yoong	-	sole proprietor of Messrs Lim & Associates and D4's sister
(xi) DW4 - Koh Yuet Thye	-	D4's mother

For D8:

(xii) DW5 - Tan Lin Lin	-	a partner of Messrs KH Tai & Co (D8) and wife of D3
(xiii) DW6 - Lim Kok Shoo	-	D3 and husband of DW5

Plaintiffs' Claim

[9] The plaintiffs contend that there was a concluded agreement on 31 July 2013 in respect of the sale of Lot 233 *via* an exchange of three letters between D8 and the plaintiffs' lawyer, Messrs Kamaruddin, Wee & Co (KWC). These were:

(i) a letter dated 22 July 2013 from KWC to D8;

(ii) a letter dated 31 July 2013 from D8 to KWC; and

(iii) a letter dated 31 July 2013 from KWC to D8.

[10] It is also the plaintiffs' contention that D8 is in breach of warranty of authority wherein by its letter dated 31 July 2013, D8 had represented itself to the plaintiffs to be the agent of D4 and by such representation induced the plaintiffs to enter into the agreement.

D4's Contention

[11] D4, who holds an undivided 25/36 share in Lot 233 contends that D8 was not authorised to act on his behalf and further, that there was no concluded and binding contract for the sale and purchase of Lot 233 by KWC's letter dated 31 July 2013.

D8's Contention

[12] D8 refutes D4's allegation that it did not have the authority to act for him. However, it takes the same position as D4 that there was no concluded and binding contract for the sale and purchase of Lot 233.

The Issues

[13] From the above it is clear that there are only two core issues for determination ie:

(i) whether there was a concluded and binding contract entered into between the parties; and

(ii) whether D8 was authorised to act for D4.

The Letters

[14] Since the three letters feature so prominently in respect of the first issue, it is necessary to set them down for a better understanding of the dispute at hand.

(i) Letter dated 22 July 2013

Your Ref : Please advise
Our Ref : SPA/MHLSB/(tml)
Date : 22nd July 2013

Messrs KH Tai & Co URGENT
Advocates & Solicitors
Suite E-11-11, Plaza Mont' Kiara

No. 2, Jalan 1/70C
Mont' Kiara
50480 Kuala Lumpur

By Fax/Courier
Fax No. 62018843
Email:tll@khtai.com.my

[Attn: Ms Tan]

Dear Sirs

Re: Sale and Purchase Agreements

Properties:	1.	GRN 35596, Lot 1275, Mukim Setapak, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("Property 1")
	2.	GM 803, Lot 233, Mukim Setapak, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("Property 2")
Vendors:	1.	Momi Rice Sdn Bhd and Lim Kim Seng (for Property 1) (collectively "Vendor 1")
	2.	Um Kok Shoo, Lim Sheng Bang, Lim Teong Siew, Lim Tiong Ooi @ Lim Teong Kian & Ho Sze Kim (for Property 2) (collectively "Vendor 2")
Purchaser	:	MH Land Sdn Bhd or nominee(s)

1. We refer to the above matter wherein we act for the abovenamed Purchaser.

2. We also refer to the telephone conversation between your Ms Tan and our Mr Tan on 22nd July 2013. We understand that you act for the above Vendor 1 and Vendor 2. Please let us have your confirmation of the same.

3. Please let us have the following documents/confirmations on urgent basis for our further action:

   a. a copy each of the issue documents of title to the above Properties;

   b. a copy each of your clients' identity cards and the Forms 11, 24, 44 and 49 and Memorandum and Articles of Association;

   c. a copy each of the previous Sale and Purchase Agreement(s) pertaining to the acquisition of the Property by your client;

   d. whether the Properties is currently occupied/tenanted. If so, please let us have a copy of the Tenancy Agreement(s) between your clients and the tenant;

   e. whether the Properties are free from encumbrances. If so, please let us have the particulars of the encumbrances and a copy each of the documents pertaining thereto;

A

f. list of the fixtures and fittings of the Property (if applicable);

g. a copy of the Certificate of Fitness for Occupation in respect of the Property (if applicable);

h. copies of the buildings/layout plans of the Property (If applicable);

B

i. a copy of each of the current year quit rent receipts and the latest assessment receipts of the Property;

j. your clients' income tax number and the branch where the income tax file is kept; and

C

k. all other relevant documents relating thereto; if any.

4. We will forward the draft Sale and Purchase Agreements for your clients' comments upon receipt of the above documents/ confirmations.

5. Your immediate action hereto is appreciated.

D

Thank you.

Yours faithfully

t.t.

cc. Client

E

(ii) Letter dated 31 July 2013

Your Ref : SPA/MHLSB/(tml)
Our Ref : Gen/TKH/13/LTK
Date : 31st July 2013

F

Messrs Kamarudin, Wee & Co
Advocates & Solicitors
A15-M, Mezzanine Floor
Jalan Selaman 1/1
Dataran Palma
68000 Ampang, Selangor BY FAX NO. 03-42707420 & POST

G

Dear Sirs,

Re:Sale and Purchase Agreements

Properties:

1. GRN 35596, Lot 1275, Mukim Setapak, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("Property 1")

H

3. GM 803, Lot 233, Mukim Setapak, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("Property 2")

Vendors:

I

1. Momi Rice Sdn Bhd and Lim Kim Seng (for Property 1) (collectively "Vendor 1")

3. Lim Kok Shoo, Lim Sheng Bang, Lim Teong Siew, Lim Tiong Ooi @ Lim Teong Kian & Ho Sze Kim (for Property 2) (collectively "Vendor 2")

Purchaser : MH Land Sdn Bhd or nominee(s)

We act for the abovesaid Vendors and refer to your letter of 22/7/2013 and to the recent telephone conversations between our Ms Tan and your Mr Tan Kar Peng.

We have our clients' instructions to inform you that our clients are agreeable to sell the above Properties at RM175.00 per square ft with vacant possession to be delivered within 9 months from the date of the sale and purchase agreement subject to an extension of 3 months and upon further terms and conditions to be agreed upon.

Yours faithfully

t.t.

K.H. TAI & Co

C.C. Momi Rice Sdn Bhd
C.C. Mr Lim Teong Kiat & 3 Ors
C.C. Mdm Lim Sheng Bang
C.C. Mr Lim Kok Shoo

(iii) Letter dated 31 July 2013

Your Ref : Gen/TKH/13/LTK
Our Ref : SPA/MHLSB/(tml)
Date : 31st July 2013

Messrs KH Tai & Co
Advocates & Solicitors
Suite E-11-11, Plaza Mont' Kiara
No. 2, Jalan 1/70C
Mont' Kiara
50480 Kuala Lumpur

URGENT

By Fax/Courier
Fax No. 62018843
Email:tll@khtai.com.my

[Attn: Ms Tan Lin Lin]

Dear Sirs

Re: Acceptance of Offer dated 31st July 2013

Properties:

1. GRN 35596, Lot 1275, Mukim Setapak, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan measuring approximately 70,420.50 square feet ("Property 1")

2. GM 803, Lot 233, Mukim Setapak, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan measuring approximately 142,913.62 square feet ("Property 2")

Vendors	1.	Momi Rice Sdn Bhd (undivided 76/135 shares) and Lim Teong Kiat (as trustee for undivided 118/270 shares) (for Property 1) (collectively "Vendor 1") (collectively "Vendor 1")
	4.	Lim Kok Shoo, Lim Sheng Bang, Lim Teong Siew, Lim Tiong Ooi @ Lim Teong Kian & Ho Sze Kim (as trustee for 1/18 undivided shares) (for Property 2) (collectively "Vendor 2")
Purchaser	:	MH Land Sdn Bhd or nominee(s)

We act for MH Land Sdn Bhd (who reserve right to nominate another nominee to enter the sale and purchase agreements) ("Purchaser") and refer to your Letter of Offer dated 31st July 2013 offer to sale the above Properties free from encumbrances with vacant possession (free from all squatters, tenants, occupiers and licensee) subject to the following terms and conditions:

1. in respect of Property 1

a. PURCHASE PRICE* : Ringgit Malaysia One Hundred and Seventy Five (RM175.00) per square feet, which is equivalent to Ringgit Malaysia Twelve Million Three Hundred Twenty Three Thousand Five Hundred Eighty Seven and Sen Fifty (RM12,323,587.50) only for Property 1.

b. PAYMENT TERMS : Payment shall be in the following manner:

(i) Ringgit Malaysia Two Hundred Forty Six Thousand Four Hundred Seventy One and Sen Seventy Five (RM246,471.75) only to be paid to you as stakeholders upon acceptance of this offer being earnest deposit for the purchase of Property 1;

(ii) Ringgit Malaysia Nine Hundred Eighty Five Thousand Eight Hundred and Eighty Seven (RM985,887.00) only ("Balance Deposit") paid to Vendor 1 upon execution of Sale and Purchase Agreement being balance 8% of deposit sum;

(iii) Balance of Purchase Price of Ringgit Malaysia Eleven Million Ninety One Thousand Two Hundred Twenty Eight and Sen Seventy Five (RM11,091,228.75) only to be paid to you as stakeholders within Three (3) months from the Unconditional Date;

(iv) Upon expiration of the Three (3) months to automatically grant an extension period of One (1) month to pay the balance unpaid sum at an interest rate of 8% (eight percent) per annum calculated on the unpaid balance on a day to day basis.

(v) the Balance Purchase Price in respect of Property 1 shall be released to Vendor 1 upon presentation of the Transfer in favour of the Purchaser.

2. in respect of Property 2

a. PURCHASE PRICE* : Ringgit Malaysia One Hundred and Seventy Five (RM175.00) per square feet, which is equivalent to Ringgit Malaysia Twenty Five Million Nine Thousand Eight Hundred Eighty Three and Sen Fifty (RM25,009,883.50) only of Property 2.

b. PAYMENT TERMS : Payment shall be in the following manner:

(i) Ringgit Malaysia Five Hundred Thousand One Hundred Ninety Seven and Sen Sixty Seven (RM500,197.67) only to be paid to you as stakeholders upon acceptance of this offer being earnest deposit for the purchase of Property 2;

(ii) Ringgit Malaysia Two Million Seven Hundred Ninety and Sen Sixty Eight (RM2,000,790.68) only ("Balance Deposit") paid to Vendor 2 upon execution of Sale and Purchase Agreement being balance 8% of deposit sum;

(iii) Balance of Purchase Price of Ringgit Malaysia Twenty Two Million Five Hundred Eight Thousand Eight Hundred Ninety Five and Sen Fifteen (RM22,508,895.15) only to be paid to you as stakeholders within Three (3) months from the Unconditional Date;

(iv) Upon expiration of the Three (3) months to automatically grant an extension period of One (1) month to pay the balance unpaid sum at an interest rate of 8% (eight percent) per annum calculated on the unpaid balance on a day to day basis.

(v) the Balance Purchase Price in respect of Property 2 shall be released to the Vendor 2 upon presentation of the Transfer in favour of the Purchaser.

3. Condition Precedents: (a) upon receipt by the Purchaser or the Purchaser's Solicitors of the sealed Court Order approving or sanctioning (1) the sale of undivided shares (held under the trust) in Property 1 by the trustee, Lim Teong Kiat (as trustee) to the Purchaser and (ii) the sale of undivided shares (held under the trust) in Property 2 by the trustee Ho Sze Kim to the Purchaser; or

(b) upon receipt of written confirmation that of all the squatters, tenants, occupiers and licensee from the Property 1 and Property 2 have been cleared/removed and the same has been verified by both parties by joint inspection; or

(c) three (3) months from the date of the Sale and Purchase Agreements;

whichever is later ("Unconditional Date"). Such conditions precedent shall be fulfilled with a period of six (6) months from the date of Sale and Purchase Agreement or such other longer period as the Purchaser shall deem fit.

4. Vacant Possession:	Vacant possession of Property 1 and Property 2 shall be delivered to the Purchaser within Three (3) days upon payment of the Purchase Price, failing which the Vendors shall pay to the Purchaser late delivery compensation at the rate of 8% (eight percent) per annum on the total Purchase Price calculated on daily basis from the date of full payment of Purchase Price till the delivery of vacant possession of Property 1 and Property 2.	A B
5. Execution:	The parties shall execute the Sale and Purchase Agreement within fourteen (14) working days ("said Period") from the date of this letter.	C

6. The Purchase Price shall be refunded in the event the transfer in favour of the Purchaser cannot be registered for any reason whatsoever. D

7. 10% of the Purchase Price shall be forfeited if the Purchaser failed to pay the Balance Purchase Price within the time prescribed herein and all other moneys shall forthwith be refunded to the Purchaser.

8. The Earnest Deposit shall be refunded should the material terms of the Sale and Purchase Agreement cannot be agreed upon by both parties. E

9. The above two (2) Properties shall be sold to the Purchaser together, if the sale of either one is not successful the other one shall be deemed not successful and all monies paid to Vendor 1 and Vendor 2 or the Vendors' Solicitors shall be refunded to the Purchaser immediately. F

10. The Purchaser shall retain the right of specific performance of this offer.

11. Time shall be of the essence of this Agreement. G

12. We enclose herewith the following payments:

    a. our client's PBB cheque no. 273373 for the sum of RM246,471.75 made in your favour as stakeholders and being the earnest deposit for the above purchase of Property 1; and

    b. our client's PBB cheque no. 273374 for the sum of RM500,197.67 made in your favour as stakeholders and being the earnest deposit for the above purchase of Property 2. H

13. Kindly acknowledge receipt of the above by signing and returning the duplicate of this letter to us.

I

Yours faithfully

t.t.

Encl

cc. Client

*Note. The Purchase Price will be adjusted later to take into account the reduction of land area due to land acquisition (if any) by relevant authority.

Issue 1: Was There A Concluded Agreement?

Plaintiffs' Submission

[15] The plaintiffs' position is that there was a concluded agreement. The plaintiffs draw support from the Supreme Court's decision of *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754 and the Federal Court's decision of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327 which, the plaintiffs contend, is on all fours with this present case.

[16] The plaintiffs take the view that KWC's letter dated 31 July 2013 constitutes a concluded and binding contract for the sale and purchase of Lot 233 for the following reasons:

(a) First, it has identified the property concerned with clarity as can be seen from the subject caption of the letter where Lot 233 is set down in the title "properties" as item 2 and described as "GM 803 Lot 233, Mukim Setapak, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("Property 2")".

(b) Second, it has identified the parties concerned where at the subject caption of the letter D3, D4, D5, D6 and D7 are named as the "vendors" of Lot 233 and the plaintiff or nominee(s) as the "purchaser".

(c) Third, the price for Lot 233 (Property 2) has been clearly set out in cl. 2a of the letter being RM175 per square foot amounting to RM25,009.883.50 in total, and the payment terms have also been set out clearly in cl. 2b of the letter in the following manner:

(i) RM500,197.75 (2%) on acceptance;

(ii) RM2,000,790.68 (8%) on execution of the sale and purchase agreement; and

(iii) RM22,508,895.15 (90%) within three months from the unconditional date.

(d) Fourth, the manner and form of possession have also been clearly set out where the opening paragraph of the letter defines vacant possession as "free from all squatters, tenants, occupiers and licensee". This is reiterated in cl. 3b in relation to the written confirmation of the removal of all squatters *et al*. Further, cl. 4 also spells out the obligation of the vendors to deliver vacant possession "within three (3) days upon

payment of the purchase price" and in the event the vendors failed to observe the timeline, "the vendors shall pay to the purchaser late delivery compensation at the rate of 8% (eight percent) per annum on the total purchase price calculated on a daily basis". A

(e) Fifth, it is even spelt out at cl. 10 that the "purchaser shall retain the right of specific performance of this offer". B

[17] The plaintiffs argue that all these have been agreed to by D8 for D4 and there is nothing more by way of any further material and fundamental terms to be agreed. In fact throughout this case, D4 and D8 had not even once suggested what further material and fundamental terms were to be still agreed. C

[18] The plaintiffs further contend that there has been part performance of the concluded contract. The plaintiffs had paid the 2% earnest deposit for Lot 233, which 2% earnest deposit had been accepted and banked in by D8 into its client's account, where the money still stands to this day. D

[19] The plaintiffs submit that if indeed the material and fundamental terms as set out in KWC's letter dated 31 July 2013 were not agreeable, D8 should and would have returned the 2% earnest deposit given cl. 8 of the letter which provides that "the earnest deposit shall be refunded should the material terms of the sale and purchase agreement cannot be agreed upon by both parties" . The fact that the 2% earnest deposit was banked in is clear evidence of there being a concluded and binding contract which has been part performed. E

[20] Furthermore, D8 had accepted this to be its position. In its letter of 20 August 2013 to DW3 (Lim Sung Yoong) of Lim & Associates, D8 had written: F

> Following your email of 1/8/2013 we had deposited the earnest monies in our client's account as stakeholders towards acceptance of the offer dated 31/7/2013. As such we shall not be held liable for any consequence as a result of his (the 4th Defendant's) refusal to proceed with the execution of the sale and purchase agreement. G

[21] The above letter in fact is revelatory of D8's position in respect of the SPA to be executed, in that it appears to be a mere formality and a requirement or term of the concluded and binding contract contained in KWC's letter dated 31 July 2013 which by cl. 5 of the said letter, the "parties are to execute the sale and purchase agreement within fourteen (14) working days from the date of this letter". H

[22] It is therefore the plaintiffs' submission that the execution of a formal SPA is but a mere term of the contract already concluded by KWC's letter dated 31 July 2013 which was accepted by D8. As such, the plaintiffs have also prayed for an order of specific performance that D4 executes such sale and purchase agreement as it is a term of the concluded contract that the vendor signs the sale and purchase agreement. I

[23] The plaintiffs draw support from the Court of Appeal's decision in *MWE Properties Sdn Bhd v. Saw Lip Kean* [2011] 8 CLJ 172 wherein the appellate court found there was a concluded contract between the parties despite the want of a duly executed formal written agreement as all the necessary ingredients that constitute a contract were in existence, ie, there was consideration, certainty of parties, certainty of property, certainty of price and also the unequivocal acts of past payments or past performance by the respondent which pointed to an existing contract between the parties (see para. 23 of the judgment).

[24] Likewise, the plaintiffs argue that all the necessary ingredients to constitute a concluded agreement are similarly found in the instant case by KWC's letter dated 31 July 2013.

[25] The said letter is clearly an 'open contract' which the Federal Court in *Charles Grenier* held to be "enforceable as if it is embodied in a document with all the attendant solemnity": the SPA was but a mere formality.

D4's Submission

[26] D4 vehemently disputes that there was a concluded agreement and draws support from the contents of the letters and the evidence of the two lawyers (PW7 and DW5) who authored the letters.

[27] It is D4's position that there can be no concluded agreement because nowhere in the letters is there any express acceptance of D8's offer to sell which in any event was subject to "further terms and conditions being agreed upon".

[28] DW5's evidence was highlighted in which she had agreed that as 31 July 2013 there was no concluded and binding agreement.

[29] It is D4's submission that there was no concluded agreement for the following reasons:

(i) It is evident from KWC's letter dated 31 July 2013 that they had NOT accepted D8's offer or proposal: KWC in fact was making a counter offer or counter proposal when the acceptance of D8's offer was "subject to the following terms and conditions";

(ii) Amongst the terms not agreed upon was D8's proposal that "vacant possession was to be delivered within nine months from the date of the SPA subject to an extension of three months". KWC had counter proposed that vacant possession be given within six months resulting in D8 amending the said clause to read "nine months subject to an extension of three months", which amendment KWC had yet to respond;

(iii) D8 had also amended cls. 6 and 7 of the said letter;

(iv) As for cl. 8, it is D4's submission that KWC had made it crystal clear that:

(a) the sale and purchase of Lot 233 is subject to the material terms of the SPA being agreed to by both parties; and

(b) if the material terms are not agreed by both parties then the earnest deposit shall be refunded.

D4 argued that by cl. 8, KWC has made it clear that the sale would only be concluded by a SPA being agreed to and duly executed by both parties;

(v) Furthermore by cl. 9 the purchaser had committed itself that both properties must be sold together otherwise there would be no deal and the vendors must refund all monies paid by the purchaser; and

(vi) D4 further argued that by cl. 10 the plaintiffs had admitted that by retaining the right of specific performance of the offer, the letter was merely a counter offer.

[30] A host of cases was cited in support of his contention that there was no concluded contract in light of s. 7 of the Contracts Act 1950 which provides that acceptance must be absolute and unqualified – including, amongst others, *Tan Chee Hoe & Anor v. Ramjethmal Punjabi* [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022; [1983] 2 MLJ 31, *Mahabuilders Bhd v. Hotel Rasa Sayang Sdn Bhd* [2014] 3 CLJ 661; [2014] 10 MLJ 593, *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 BLJ 9; [1994] 1 MLJ 108 and *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754.

D8's Position

[31] D8 similarly takes the position that there was no concluded agreement as at 31 July 2013 because matters were still subject to contract. Learned counsel for D8 prudently left it to the plaintiffs and D4 to robustly engage themselves over this issue.

Findings: Issue 1

[32] The issue of whether there is a binding and concluded contract is a question of law. It is trite that it is incumbent on this court to interpret the contents of the letters and not to appropriate the lawyers' opinions or views or rely upon such opinions or views for interpretation of the same: see *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96.

[33] Both the plaintiffs and D4 have referred to *Ayer Hitam Tin Dredging* (*supra*). The following passage was, *inter alia*, highlighted (at p. 140 (CLJ); p. 765 (MLJ)):

> True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v. Alexander* at pp. 288, 289 where the court said this:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

[34] In this 1994 case, the Supreme Court had laid down the above principle in respect of a letter dated 19 September 1984 by the appellant (*Ayer Hitam Tin Dredging*) accepting the respondent's proposals for a construction project, subject to certain terms and conditions.

[35] In ruling that the letter did not constitute a concluded contract between the parties, the apex court took into consideration the fact that several essential matters still remained to be settled between the parties namely:

(i) when work on the project would commence or be completed for the ascertainment of damages for late delivery and defect liability period;

(ii) the terms of "the appropriate indemnity clauses" in favour of the appellant referred to in the letter of 19 September 1984 – and in the view of His Lordship, Edger Joseph J SCJ "a matter of no little importance to the defendant bearing in mind that so far as it was concerned, liability was being incurred in respect of a not insubstantial sum of money (RM14 million) and the project was non profitable" (at p. 764);

(iii) the price of each individual unit of dwelling house, the number of units to be constructed and where to be constructed; and

(iv) the identity of the purchasers of the dwelling houses.

[36] Taking all these factors into consideration and the "vital qualifying clause" "subject to the following terms and conditions" found in the opening paragraph of the letter, one of which was the condition for the appropriate indemnity clauses be incorporated into the agreement to be drawn up, the court went on to hold the letter was merely a record of terms upon which they were agreed as a basis for the negotiations of a contract and was, in law, nothing more than a letter of intent, which was described in *Turriff Construction Ltd and Turriff Ltd v. Regalia Knitting Mills Ltd* (1971) 9 BLR 20 in the following manner:

> As I understand it such a letter is no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect.

> A letter of intent would ordinarily have two characteristics, one, that it will express an intention to enter into a contract at a future and, two, it will itself create no liability in regard to that future contract.

[37] The question that falls to be answered is whether the execution of a written formal contract is a condition or term of the bargain between the parties in this case which means that there is no concluded agreement or whether it is merely an expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through which means there is a concluded agreement.

[38] The plaintiffs draw favourable comparison with the factual matrix of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327.

[39] In *Charles Grenier*, there was an exchange of two letters between the appellant/vendor's solicitors and the respondent/purchaser's estate agents wherein the purchaser accepted the vendor's offer to sell two shophouses. The later letter, that of the respondent/purchaser's estate agents dated 28 November 1989, stated that it "... enclose(d) herewith the 10% *vide* MBB Cheque No 660088 as deposit subject to the sale and purchase agreement".

[40] Given that these words "subject to the sale and purchase agreement" are absent in KWC's letter dated 31 July 2013, the plaintiffs argue that this puts the case in *Charles Grenier* on a much higher platform than the present case. It was argued for the appellant in *Charles Grenier* that the phrase "subject to the sale and purchase agreement" appearing in the estate agent's letter of 28 November 1989 ... showed that the parties were still negotiating".

[41] The Federal Court however rejected this argument. It expressed the following opinion (at pp. 633-634 (CLJ); p. 335(MLJ)):

> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.
>
> *Unless the approach we have stated is adopted, a party to a contract who – after having concluded his bargain – entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.*
>
> The law leans in favour of upholding bargains and not in striking them down willy-nilly, and its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v. Arcos Ltd* [1932] All ER Rep 494 where he said:

> Businessman often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.
>
> This principle applies not only to documents drafted by laymen, but also to those prepared by lawyers (see *Australian Broadcasting Commission v. Australasian Performing Right Association Ltd* [1973] 129 CLR 99).
>
> (emphasis added)

[42] Then, after considering the two letters that were exchanged between the appellant's solicitors and the respondent's estate agents, which included in the latter the words "subject to the sale and purchase agreement", the Federal Court concluded and held as follows (at p. 634 (CLJ); pp. 335-336 (MLJ)):

> We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.
>
> *They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity*. In order to give it effect, the law will – acting out of necessity (see *Liverpool City Council v. Irwin* [1977] AC 239) – imply terms into the contract for sale in order to make it work. See *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land, a covenant on the part of the vendor to do all things necessary to give effect to the agreement.
>
> Dr Geoffrey Cheshire in the 10th edition of his work, *The Modern Law of Real Property*, describes an open contract as follows:
>
> > If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.

> The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it is, when read in the context of the correspondence and the objective aim of the transaction – and this is how we read them – indicative of an intention to merely formalise the agreement already concluded between the parties. We therefore entertain no difficulty whatsoever in rejecting the argument advanced by Mr Abraham upon the first issue.
>
> (emphasis added)

[43] *Charles Grenier* has since been adopted and applied by our courts as reflected in the following cases:

(i) *Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia* [2000] 3 CLJ 313; [2000] 2 MLJ 535;

(ii) *Loh Hoot Yeang v. Derrick Edwin David* [2006] 2 CLJ 66;

(iii) *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; and

(iv) *MWE Properties Sdn Bhd v. Saw Lip Kean* [2011] 8 CLJ 172.

[44] In *Cipta Cermat* (*supra*) the Court of Appeal held that the absence of a duly executed formal agreement did not vitiate the fact that there was a concluded contract as there was an offer, acceptance and consideration besides certainty of parties, certainty of price and certainty of property. There was also the unequivocal act of part performance of the contract.

[45] The facts of this present case are on all fours with *Cipta Cermat*.

[46] In light of the high authority of *Charles Grenier*, I find there was a concluded agreement in the trilogy of letters for the following reasons:

(i) The parties have been identified with sufficient clarity as also the property and price;

(ii) In respect of price, it was expressly set out in cl. 2a of the letter being RM175 per square foot amounting to RM25,009,883.50 in total and the payment terms have also been set out in cl. 2b being:

  (a) RM500,197.75 (2%) on acceptance;

  (b) RM2,000,790.68 (8%) on execution of the sale and purchase agreement; and

  (c) RM22,508,895.15 (90%) within three months from the unconditional date.

(iii) The manner and form of possession have also been set out: see cl. 3a and cl. 4 of the letter dated 31 July 2013; and

(iv) There has been part performance as the plaintiffs have paid the 2% earnest deposit for Lot 233 which sum has been accepted and banked into D8's client's account.

[47] If the essential or material and fundamental terms were not agreeable to the defendants, D8 would and should have returned the 2% earnest deposit as cl. 8 of the letter states that "the earnest deposit shall be refunded should the material terms of the sale and purchase agreement cannot be agreed upon by both parties".

[48] Instead, as stated earlier, D8 had proceeded to accept and bank in the 2% earnest money signifying part performance of a concluded and binding contract.

[49] In my view, the agreement is an "open contract" as expounded by the apex court in *Charles Grenier* which in law is enforceable. Read in the context of the three letters, the objective aim of the transaction is indicative of an intention to merely formalise the agreement already concluded between the parties. It was not a mere letter of intent.

[50] I do not agree with D4's submission that there was no concluded agreement as the events post KWC's letter of 31 July 2013 show otherwise ie, that it was accepted by D8, subject to some amendments which according to PW2, were accepted by the plaintiffs. PW2's evidence on this point was not challenged.

[51] It is manifestly clear that D8's letter of 31 July 2013 was an "invitation to treat" and KWC's letter of even date was a counter offer to which DW5 had made some amendments which was in turn, accepted by the plaintiffs: this is clear evidence of acceptance.

[52] I find the authorities cited by D4 are not wholly relevant to the issue at hand.

Issue 2: Is D8 Liable For Breach Of Warranty?

Plaintiffs' Position

[53] In a nutshell the plaintiffs' sole cause of action against D8 is that D8 represented that it acted for D4 when in fact it did not.

D4's Position

[54] D4's main argument in respect of this second issue is that there was no written authority or instructions for D8 to act for him. D4 also relies on the testimony of his mother.

D8's Position

[55] It is D8's firm position that D8 was authorised to act for D4 in respect of the negotiations for the sale of Lot 233. The following was highlighted by learned counsel for D8:

(i) The "jugular" piece of evidence comprising, *inter alia*:

(a) KWC's letter dated 31 July 2013 enclosing two cheques for the sums of RM246,471.75 and RM500,197.67 respectively being the earnest deposit for the purchase of the two lots. This earnest deposit still remains in D8's client's account.

(b) Upon receipt of this letter, DW5 had the presence of mind to forward the letter to DW3, the sister of D4 *via* an email dated 31 July 2013 at 3.43pm. DW5's email reads:

> Khtai&co<khtalco@gmail.com> Wed, Jul31, 2013 at 3.34PM
>
> To: Sung Yoong Lim <limassoc@yahoo.com>
>
> Dear Ms Lim,
>
> I am attaching here copies of the letter from Messrs Kamaruddin & Wee together with the cheques issued in our favour as stakeholders for your transmission to Lim Sheng Bang. We will forward you the draft sale & purchase agreement upon our receipt of the same from the Purchaser's Solicitors.
>
> Rgds,
> Tan Lin Lin
> K.H. Tai & Co.
> Suite E-11-11, Plaza Mont Kiara,
> No. 2, Jalan Kiara, Mont Kiara,
> 50480 Kuala Lumpur
>
> Tel : 03-62018848
> Fax : 03-62018843

(c) DW3 then responded, also by email, dated 1 August 2013 at 11.32am. She wrote:

> Thu, Aug 1, 2013 at 11.22 AM
>
> LIM AND ASSOCIATES <limassoc.lawfirm@yahoo.com.my>
>
> Reply To: LIM AND ASSOCIATES <limassoc.lawfirm@yahoo.com.my>
>
> To: khtaico@gmail.com <khtaico@gmail.com>
>
> boxbe LIM AND ASSOCIATES (limassoc.lawfirm@yahoo.com.my) is not your Guest List I Approve sender I Approve domain
>
> To KH TAI & CO
> Re Lot 233 Mukim Setapak,
>
> | | |
> |---|---|
> | i. Area of Land as per title 1.376H = | 13760 sq m |
> | Acquisition | 482.89 sq m |
> | Bal 13277.11 sq m x 10.764 sq ft = | 142914.81 sq feet |

A ii. CI 3a Condition Precedents of Kamarudin Wee & Co's letter

1. Do you still have to get order for sale for Property 1 & 2. If yes, how long?

2. 9 months?

B iii. Sheng Bang's 25/36 shares – issue separate chqs

iv. CI 9 – hve all beneficiaries given you written consent to sell?. If not waste of time to proceed.

From LIM & ASSOC

C (d) The irony of DW3's comment that it would be a "waste of time to proceed" if all the beneficiaries did not consent was not lost on D8 given the position now taken by her brother D4 that he never agreed to sell Lot 233.

(ii) At a meeting held on 7 August 2013 between DW4 (D4's mother), D DW6 (D3) and DW5, DW4 informed DW5 that her daughter (DW3) would now be acting for D4 in respect of the sale of Lot 233. DW4 also informed that D4 was no longer interested in selling Lot 233;

(iii) This led to D8 discharging itself from acting for D1 and D4. On 19 August 2013, M/s Jin Nge & Co was appointed in replacement. D8 E also discharged itself from acting for D2, D3, D5, D6 and D7 sometime in September 2013. D8's authority to act for these defendants in matters concerning this suit was however never challenged;

(iv) The pleadings

F D8 contends that nowhere in D4's defence has it been pleaded that he did not authorise D8. To the contrary, it is D4's pleaded case that D8 was duly authorised by D4. As such, D4 is bound by his pleadings. Furthermore, no evidence was ever presented by the plaintiffs to establish D8's want of authority;

G (v) The retainer

It is D8's contention that the evidence led at trial in particular the email of 31 July 2013 established the fact that D8 was not only authorised to act but was also acting in accordance with D4's mandate in respect of the sale of Lot 233;

H

(vi) Afterthought

D8 also contends that the allegation of want of authority is very much an afterthought given the contemporaneous letters and emails exchanged, particularly Lim & Associates letters dated 21 August 2013 I and 22 August 2013 where there was no mention at all of lack of authority;

(vii) Ratification

D8 submits that in light of the documentary evidence, any want of authority on the part of D8 had been ratified;

(viii) The Boss Lady

Much was made of the status and "power" wielded by DW4 referred to as "the Boss Lady" by the witnesses. She is the mother of D4 and as testified by the estate agents (PW4, PW5 and DW2) the "go to" person in respect of the sale of Lot 233.

All the facts and evidence lend credence to D8's case that she was the one who authorised D8 to act for her son, D4; and

(ix) The tape recording

D8 submits the tape recording is cogent evidence that there were never issues regarding D8's authority. In this tape recording Madam Koh featured prominently in the discussion regarding the sale of Lot 233 and the reason Madam Koh reneged on the sale to the plaintiffs was purely monetary – she now wanted to sell for RM200 (instead of RM175 per sq ft).

[56] No issue was taken with regard to D8's lack of authority. It also showed up Madam Koh for what she was – a witness wholly devoid of credibility in light of what she said in the tape recording and her evidence in court.

Findings: Issue 2

The Pleadings

[57] The plaintiffs had pleaded "Breach of warranty of authority" in paras. 19-21 of the statement of claim as follows:

Breach of warranty of authority

19. On or about 31.7.2013 by the 8th Defendant's letter of the same date, the 8th Defendant represented itself to the Plaintiff to be the agent of the 1st to 7th Defendants, and induced by such representation the Plaintiffs entered into the Agreement and proceeded to act upon such Agreement.

20. In the premises, the 8th Defendant warranted to the Plaintiff that it was authorised by the 1st to 7th Defendants to enter into, make and conclude the Agreement for them as their agent and the Plaintiffs entered into the Agreement in consideration for the said warranty.

21. As stated above, the 1st to 7th Defendants now seek to deny the Agreement thus taking the position that the 8th Defendant did not have the authority to enter into, make and conclude the Agreement for them.

[58] D4 responded by pleading in his defence:

> 16. In reply to paras 19, 20, 21, 22 (a) to (b) the 4th Defendant contends that he has no knowledge of the contents therein and vehemently deny the contents of para 21 and puts the Plaintiffs to strict proof thereof.

[59] Considering that by para. 21 of the plaintiffs' statement of claim the plaintiffs had alleged that D1-D7 "now seek to deny the agreement thus taking the position that the eighth defendant did not have the authority to enter into, make and conclude the agreement for them", D4 has by "vehemently" denying the contents of para. 21 and putting the plaintiffs to strict proof admitted that D8 was duly authorised by him.

[60] Nowhere in his defence had D4 pleaded that D8 was not authorised by him: the gravamen of his defence is that there was no concluded agreement and that he had never agreed to sell Lot 233.

[61] It is trite that parties are bound by their pleadings: D4 cannot be now allowed to resile from his pleaded case to deny D8's authority to act on his behalf. On this ground alone, D4's contention that D8 lacked authority to act on his behalf cannot be sustained.

No Written Authorisation/Retainer

[62] A retainer does not have to be in writing and may be oral. It can also be inferred from acts subsequently done by the solicitor and acquiesced to by the client. In *Blyth v. Fladgate* [1891] 1 Ch 337 the court held that though there had not been an express retainer, the relation of solicitor and client might be inferred from the acts of the parties.

[63] In our present case, evidence was led that upon receipt of the email from D8 enclosing KWC's letter of 31 July 2013, DW3, whom D4 claimed to be his solicitor all along, not only commented on the terms proposed by M/s KWC but instructed D8 that the amount payable to D4 be paid separately, "to issue separate cheques" and queried whether the other beneficiaries had given their written consent for otherwise it would be a "waste of time to proceed" all pointing to the fact that DW3 was endorsing D8's actions and expressing D4's agreement to proceed with the transaction.

[64] I concur fully with the submission of learned counsel for D8 as found in para. 45:

> 45. Ms Lim's e-mail is a piece of contemporary documentary evidence which corroborates and supports the 8th defendant's case that the 8th defendant was not only authorised to act but was also acting in accordance with the 4th defendant's mandate (in trying to facilitate the sale of the lands). This e-mail, at the least undermines, if not destroys the 4th defendant's contrary position that he never authorised the 8th defendant and/or that he never wanted to sell Lot 233. The cogency of this e-mail is further compounded by the

> fact that Ms Lim is the 4th defendant sister, his witness and his avowed "solicitor" at all times. Perhaps most crucially is the fact that Ms Lim's e-mail was drafted after she had consulted the 4th defendant – see the Notes of Evidence for 10.06.2015 at page 33.

[65] I concur with D8 that DW3's email and testimony is cogent evidence of the fact that D8 was authorised by D4 and that it was D4's intention to sell Lot 233 as at 31 July 2013.

[66] In this regard, I also agree with D8 that the allegation of D8's lack of authority is nothing but an afterthought.

Evidence Of DW4, Madam Koh Yuet Thye

[67] It is necessary for me now to make some observations with regard to the credibility of DW4, Madam Koh, the mother of D4 and DW3.

[68] From the evidence of the witnesses, and the tape recording it cannot be denied that she was the controlling mind in the abortion of the sale of Lot 233.

[69] She was, and by all accounts, still is, pulling all the strings insofar as the family land transactions are concerned, being the one who had been purchasing property over the years for D4, collecting the rentals on the lands and known by the tenants on the land and the estate agents as the "Boss Lady", a sobriquet she was well aware of. She was the one the estate agents made a beeline for insofar as the sale of lands belonging to D4 are concerned.

[70] The taped conversation between PW3 and her on 5 September 2013 is irrefutable evidence that she was the decision maker for D4 and the real reason why D4 backed out of the sale was because she wanted more, considerably more than the agreed RM175 per sq ft. Her avarice is evident when she, after a lengthy discussion finally said (at p. 17 line 2 of the translation of the transcript):

> I, I just said like this, now someone offer me 200, you all can offer us 200, we sell to you.

[71] At the tail end of the conversation, this exchange took place (at p. 20 line 7-18):

> Female: Now like this you cannot offer 200 meh?
>
> Male 2: Impossible.
>
> Female: People give us 200.

[72] The allegation of D8's ostensible want of authority and the insistence that there was no concluded agreement is nothing more than a camouflage for a demand for more money. As pleaded by the plaintiffs it was an attempt to hold the plaintiffs to ransom by demanding an additional sum of RM25 per square foot for Lot 233.

A

Conclusion

[73] I find that the plaintiffs have proved, on the balance of probabilities that D8 had the authority to act for and on behalf of D4 and the trilogy of letters constitute a binding and concluded contract for the sale of Lot 233.

B

[74] D4 had wrongfully repudiated the concluded contract. Reliefs sought.

[75] The plaintiffs seek specific performance of the agreement as well as exemplary damages.

[76] In light of the findings of this court, the plaintiffs are entitled to the reliefs they seek in para. 23 of the statement of claim namely:

C

a. an order for specific performance of the agreement concluded on 31 July 2013 as prayed for in (a)(ii), (b)(i) and (ii), (c), (d) and (j).

An order for the reliefs above is hereby allowed.

D

Exemplary Damages

[77] The plaintiffs' claim for exemplary damages is grounded on D4's conduct ie, his cynical disregard of the concluded contract in favour of a subsequent higher offer, compounded by his mother's attempt to "extort" an extra RM25 per sq foot over the agreed sum of RM175 per sq foot. The

E

plaintiffs seek the sum of RM2.48 million which is the equivalent of what D4 sought to gain for himself at the expense of the plaintiffs.

[78] I concur with the plaintiffs that D4's conduct in this case calls for exemplary damages to be awarded.

F

[79] However, I am of the view that RM2.48 million is inordinately high. A reasonable sum in my view is RM300,000.

[80] This sum of RM300,000 shall be deducted from the balance purchase consideration payable by the plaintiffs to D4.

G

[81] In light of my finding that D8 did not lack authority to act for D4, the plaintiffs' claim against D8 is dismissed with costs.

H

I